No. 105, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

On Exceptions To The Fifth And Final Report Of The Special Master

COLORADO'S RESPONSE TO KANSAS' MOTION FOR LEAVE TO FILE AND SUR-REPLY

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TABLE OF AUTHORITIES

Page

CASES

California v. Arizona, 440 U.S. 59 (1979).....2, 3

Florida v. Georgia, 58 U.S. (17 How.) 478 (1854).....3

Kansas v. Colorado, 128 S.Ct. 1467 (2008).....1

Kentucky v. Denison, 65 U.S. (24 How.) 66 (1861).....2, 3

OTHER AUTHORITIES

28 U.S.C. § 1920 2

COLORADO'S RESPONSE TO KANSAS' MOTION FOR LEAVE TO FILE SUR-REPLY

Colorado objects to Kansas' motion for leave to file a sur-reply on the grounds that the motion is untimely and because the reasons offered by Kansas do not justify filing a sur-reply at this late date.

On February 25, 2008, the Court entered an Order receiving the Fifth and Final Report of Special Master Arthur L. Littleworth and allowing 45 days to file exceptions, with supporting briefs, and 30 days to file replies. *Kansas v. Colorado*, 128 S.Ct. 1467 (2008). These times are consistent with the times for appellants and appellees to file briefs under Rule 25 of the Rules of the Supreme Court.

Kansas filed an exception to the Special Master's ruling on costs for expert witness fees, with a supporting brief, on April 10, 2008. Colorado filed its reply on May 12, 2008. Now, five months later, Kansas has filed a motion for leave to file a sur-reply. The Court's February 25, 2008 Order did not provide for sur-replies; however, Kansas states that in a case within the Court's appellate jurisdiction, a reply would be permitted as a matter of course. Kansas' Motion, ¶ 5. However, in cases within the Court's appellate jurisdiction, Rule 25.3 of the Court's Rules provides that a reply brief shall be filed within 30 days after the brief for the appellee is filed. Therefore, waiting five months to file a motion for leave to file a sur-reply does not comport with the time to file a reply brief in a case within the Court's appellate

jurisdiction, and Rule 25.4 states that an application to extend the time to file a brief on the merits is not favored. Under the circumstances, Kansas should have the burden to make a compelling case that a sur-reply is warranted.

Rule 25.5 of the Court's Rules allows a party to file late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief; however, Kansas does not rely on this Rule as the basis for its motion for leave to file a sur-reply. Instead, Kansas seeks leave to file a sur-reply on the grounds that Colorado's Reply made arguments to which a reply is warranted and to ensure that the Court is aware of certain legal authorities, such as *Kentucky v. Denison*, 65 U.S. (24 How.) 66 (1861), and *California v. Arizona*, 440 U.S. 59 (1979). Kansas' Motion, ¶¶ 7, 9.

The arguments made in Colorado's Reply at pages 12-14 concerning the interpretation of 28 U.S.C. § 1920, to which Kansas seeks to respond in a sur-reply, are the same reasons the Special Master relied on in ruling that 28 U.S.C. § 1920 applies to the Supreme Court. Therefore, a sur-reply to respond to those arguments is not warranted, since Kansas had an opportunity to address those arguments in its brief in support of its exception. To the extent Colorado offered an additional argument in support of the Special Master's interpretation of 28 U.S.C. § 1920 at page 14 of its Reply, Kansas has given no explanation for why it waited five months to seek leave to file a sur-reply to respond to this argument.

With respect to the asserted need to make the Court aware of certain legal authorities, the authorities cited by Kansas do not contravene Colorado's argument that there is no precedent that the Constitution prohibits Congress from regulating costs for expert witness fees in cases within the Court's original jurisdiction. *Kentucky v. Denison*, 65 U.S. (24 How.) 66 (1861), simply reaffirmed the holding in earlier cases that the original jurisdiction of the Supreme Court is self-executing and needs no legislative implementation. *Id.* at 98. This is consistent with *Florida v. Georgia*, 58 U.S. (17 How.) 478, 491-92 (1854), a case that was cited repeatedly by Kansas in its brief in support of its exception. Brief in Support of Kansas' Exception 14, 15, 32, 33, 37. The other authority that Kansas seeks leave to bring to the Court's attention, *California v. Arizona*, 440 U.S. 59 (1979), addressed an argument by the Solicitor General that a federal statute had operated to withdraw certain suits from the Court's original jurisdiction, *id.* at 65, a very different issue than presented by this case. Thus, the proposed sur-reply does not provide the Court with any new arguments or authority, and Kansas has not made a compelling case that a sur-reply is warranted some five months after Colorado filed its reply.

WHEREFORE, Colorado respectfully requests that the Court deny Kansas' motion for leave to file a sur-reply.

Respectfully submitted,

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